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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Carriage of the Transmissions	)	
of Digital Television Broadcast	)	CS Docket No. 98-120
Stations	)	
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	

REPLY COMMENTS OF ARMSTRONG HOLDINGS, INC. AND INTER MOUNTAIN CABLE, INC.

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SUMMARY

Armstrong Holdings, Inc. and Inter Mountain Cable, Inc. continue to support Option 7, no must carry for digital broadcast signals until the digital transition period is completed and broadcasters have returned their analog channels. The numerous policy and technical issues regarding cable carriage of DTV signals should be resolved by market-based solutions during the transition period.

While cable channel capacity has been expanding, so has the number of new cable program services. These new cable services have taken substantial investments of money and creative resources to launch, without the guarantee of success to which broadcasters claim they are entitled. And despite the increase in cable channel capacity, serious Fifth Amendment concerns are raised by taking traditional, non-common carrier video channel capacity for broadcaster use.

The constitutional problems with dual must carry are far more serious than those considered in the *Turner* cases. The notion that the Commission or the Court could ignore the changes in circumstances since 1992 is fallacious. The use of must carry to launch fringe broadcast networks, the explosion of the Internet as an alternative source of information and diverse points of view, the growing competitive environment for multi-

channel video services, all would have to be considered and the majority of the Court might well conclude that strict scrutiny would have to be applied, possibly invalidating the entire must carry law, not just dual digital and analog must carry.

Must carry means every subscriber must be able to receive the signal on every set, and on the basic tier. This means that as soon as the first DTV signal goes on the air in a market, cable would have to undertake a costly cable set top box procurement, not to mention the headend upgrade costs. Recognizing the shear absurdity of this, broadcasters ask the Commission to rewrite the law to make it "fit" the dual must carry scheme. But the Commission must adhere to a plain reading of the Act, especially where constitutional doubt would be raised by an expansive reinvention.

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To: The Commission

REPLY COMMENTS OF ARMSTRONG HOLDINGS, INC. AND INTER MOUNTAIN CABLE, INC.

Armstrong Holdings, Inc. ("Armstrong"), and Inter Mountain Cable, Inc. ("Inter Mountain"), respectfully submit their Reply Comments in response to the Commission's *Notice of Proposed Rulemaking* (*NPRM*). In these Reply Comments, Armstrong and Inter Mountain continue to support Option 7 and to oppose imposition of digital must carry requirements upon cable operators during the transition period between analog to digital broadcasting.

I. The Commission Should Not Attempt To Impose A Solution; The Industry Should Be Left To Negotiate During The Transition Phase.

It is important to note the silence of the major networks in this proceeding. Thus, two of the most important parties, cable and the major broadcast networks, prefer to work the matter out, rather than having the Commission impose a solution in a situation where most of the technical issues have yet to be

resolved.[1/] The major networks agree with cable that this complex matter is best left to a market place resolution.

The comments of NAB, MSTV and ALTS (the "Broadcasters") appear to represent primarily the interests of nascent broadcast networks such as PAXtv. For example, NAB refers to cable's alleged, "record of refusing carriage to local broadcasters, **primarily independents.**" [2/] ALTS admits that it represents, "stations not affiliated with the ABC, CBS, or NBC television network (sic), but only truly independent stations **and local television stations affiliated with the Fox, PAXtv, UPN and WB networks.**"[3/] The real dividing line is between the established networks, who are content to let market demand determine their digital cable carriage, and newer upstart networks such as PAXtv that seek to use must carry to gain an advantage over new cable/satellite launched networks.

The cable services we now take for granted, such as CNN, the Weather Channel, C-Span, BET, Nickleodean, Discovery, and ESPN, as well as the newer cable channels launched over the past few years, such as History, Romance, Comedy, House and Garden, TNN,

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[1/] Time Warner and CBS recently announced a voluntary digital carriage agreement.

[2/] NAB Comments (hereafter "NAB") at i.

[3/] ALTS Comments (hereafter "ALTS") at 1 (emphasis added). Although ALTS asserts its represents the interests of Fox affiliates, Fox appears not to have filed in support of must-carry.

America's Voice, BET on Jazz, and the myriad of cable local and regional news channels,[4/] would appear to have as much "value", if any such concept is susceptible to determination by Congress or this Commission, as any of the newer broadcast networks. The new broadcast networks simply seek to use analog and now digital must carry to obtain cable "shelf-space" without offering comparable incentives to those offered by new cable networks.

NAB launches its comments with the assertion that must carry is necessary, "to prevent cable from exercising the expanding gate-keeper power of its local monopoly...." Yet, in the next paragraph, NAB admits that "independents" compete with cable "for audience and local advertising" and two pages later NAB asserts that "DTV competitors...will have... bright futures, **even perhaps as multi-channel competitors.**"[5/] NAB is wrong in referring to "expanding gate-keeping power" of cable, as the Commission is aware that cable faces increasing, not decreasing competition, from a number of sources.[6/]

NAB/MSTV/ALTS assert that the original purpose of must carry was to "preserve...free, local television", but the new must

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[4/] Armstrong and Inter Mountain Comments at 20.

[5/] NAB at i and iii (emphasis added).

[6/] DBS now is subscribed to by about 10% of MVPD households. *Fourth Annual Competition Report*, FCC 97-423 (Jan. 13, 1998), App. E.

carry rights they seek fit none of those goals.[7] They are not seeking to "preserve" existing services, but to gain a competitive advantage over cable networks in launching new services. By gaining must carry for advertiser supported channels, incentive fees that otherwise would have been paid for cable carriage (and which are paid by some new cable networks) can be used to launch DTV subscription services, with the result that cable must carry is being used to cross-subsidize pay DTV.[8]

Certain broadcasters appear to support some middle ground regulatory scheme in which cable could add DTV signals on a "reasonably priced" new cable digital tier, rather than on the basic tier, and therefore might not have to down convert for all receivers of all subscribers.[9] As a regulatory solution to be imposed by the Commission, Options 2-6 cannot escape the fatal statutory and Constitutional defects of Option 1, as shown herein. The industry can reach negotiated solutions that would not be limited by the terms of the must carry statute, or the constitutional issues.

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[7] NAB at i.

[8] The services they launch are not likely to be "local", as witness the new PAXtv whose promos tout the fact that PAXtv runs "counter-programming" during the time periods when other stations air local news.

[9] MSTV Comments (hereafter "MSTV") at 51-56.

A key element that must be resolved by the parties is the technical compatibility between broadcast and cable DTV.[10/] Because of such unresolved technical issues, as well as those discussed herein, the best course for the Commission is to forebear from any regulatory action and allow the industry dialog to continue and technology issues to be worked out, as suggested in Option 7.

II. Dual Must Carry Would Be Unconstitutional.

None of the Options 1-6 can be reconciled with cable's constitutional rights. Taking only some of cable's channel capacity still is a prohibited taking. And dual must carry of digital and analog does not pass the *Turner* balancing test.

A. Even If The Channel Capacity Burden Were Declining, An Unconstitutional Taking Is Presented.

Armstrong and Inter Mountain support those commenters who have noted that must carry presents a Fifth Amendment taking

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10/ In this regard, Armstrong and Inter Mountain also support Microsoft's Comments explaining the complex technical issues that must be worked out before cable systems could carry DTV signals: lack of end-to-end copyright protection, lack of Internet Protocal ("IP") standards for DTV needed to allow integrated service offerings, and the inherent problems with either pass-through or re-modulation. Pass through of the DTV signal would mean that only subscribers with a high end DTV set would be able to decode the signal, while a maximum amount of cable bandwidth would be taken away from other cable services that might be preferred by other subscribers. Re-modulation of DTV signals by the cable industry could provide in effect a down conversion to allow more subscribers to enjoy DTV, but cable and broadcasters would have to agree on standards for remodulation, and broadcasters' wish lists might conflict with cable, and cable subscribers, choice as to box costs and functions.

issue to the extent that it involves video cable television channels. Such channels historically have been treated as private channels not open to third party access.[11/]

Broadcasters [12/] argue that the channel capacity burden is not increasing (since the 1/3 limit remains the same) and in fact is decreasing due to an "explosion" in cable channel capacity as cable systems add a digital tier.[13/] While the issue of the burden on cable may be relevant to a First Amendment balancing test, as discussed above, under the Fifth Amendment the government is not entitled to take cable channels and give them to broadcasters, no matter whether the proportion of such channels is small or decreasing.

For example, cable operators are entitled to access to "dedicated" utility easements.[14/] Since such easements are dedicated to public use, a Fifth Amendment taking issue is not involved. On the other hand, cable has been excluded from use of

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[11/] *E.g., FCC v. Midwest Video Corp.*, 99 S.Ct. 1435, 1438 (1979).

[12/] Armstrong and Inter Mountain refer the commenters supporting must carry as "the broadcasters", but request that the Commission note that the established networks did not comment in favor of must carry and the number of "truly independent stations" (ALTS at 1) is decreasing with the proliferation of new broadcast networks.

[13/] One significant flaw in this position is that the must carry statute as written would require carriage of DTV broadcast on a basic tier receivable by all subscribers on all sets, as discussed above.

[14/] 47 U.S.C. §541(a)(2).

private easements on the grounds that statutorily mandated access to private easements would be violative of private easement owners' Fifth Amendment rights.

The courts concluded that insertion of even a 1/4 inch coaxial cable in a ten foot wide private utility easement would be an unconstitutional taking of the owner's property, i.e., the right to exclude others from one's property, lauded by the courts as one of the most fundamental incidents of ownership.[15/] Similarly, taking one channel from 500 is still a taking. Equity demands that broadcasters be treated similarly with cable operators when it comes to access versus Fifth Amendment property rights.

The reasons for the taking are irrelevant - unlike the First Amendment case, there is no balancing of the alleged public benefit.[16/] Absent compensation (not provided for under the Act) the taking is barred by the Fifth Amendment.[17/] Nevertheless, from the Commission's standpoint, it is worth noting that the

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[15/] *Cable Holdings of Georgia v. McNeil Real Estate*, 953 F.2d 600, 604 (11th Cir. 1992)("The most fundamental private property right is the owner's ability to exclude others"); *accord, Century Southwest Cable Television v. CIIF Associates*, 33 F.3d 1068 (9th Cir. 1994); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable v. Sequoyah Condo. Council*, 737 F. Supp. 903, 905 (E.D. Va. 1990)(Cable excluded even though "rights-of-way are 10 feet wide").

[16/] *Id.*

[17/] *Id.*

Broadcasters want cable to be required to "pass through" every advertiser supported service offered by every broadcaster by any digital methodology. For example, cable would be required to "pass through" advertiser supported broadcast Internet services or "webcasts," according to the broadcaster formulation that only pay or subscription services are excludable and every advertiser supported service must be passed through.[18/] Thus, the Commission is being asked to take traditional cable video program channels at least in part for the purpose of allowing broadcasters to launch new data services and other non-video services, so long as they are advertiser supported, according to the Broadcasters.

B. The *Turner* Cases Would Have To Be Revisited In The Event The Commission Chooses To Impose Dual Must Carry.

The NAB submits an elaborate study intended to show that cable channel capacity is expanding and the burden of must carry is actually declining, including that one 6 MHz channel can carry two HDTV signals.[19/] Whether intentionally so or not, what purports to be a scholarly study is entirely misleading.[20/]

[18/] NAB at 39-40; MSTV at 28 ("Ancillary or supplementary services should be those services for which the subscriber must pay, as opposed to services that are advertiser supported."); ALTS at 69.

[19/] NAB, Appendix D.

[20/] History has shown that as cable system capacity has expanded, the number of program services also has grown and, in fact, has continued to outstrip channel availability. Manipulation of statistical averages cannot overcome common sense and experience:
(continued...)

Particularly objectionable is the attempt to suggest that digital must carry during the transition period would be gradual or reasonable in nature, allegedly because broadcast stations will begin DTV service over a staggered schedule, while cable will be adding new digital capacity. On the contrary, under must carry, a cable system would have to provide every subscriber with a digital converter box for every receiver and would have to add digital capacity to every basic tier **as soon as the first DTV channel was offered in a market.** The broadcaster channel capacity study is a red herring designed to distract attention from the real burdens on cable.

As discussed earlier, under Section 614(b)(7) cable would be required to provide a down converter for every receiver of every subscriber as soon as the first DTV channel was offered in a market, rather than rolling out digital STB's only to subscribers who choose to pay for a new digital tier of service, and allowing cable and its subscribers the choice not to include DTV down converters in cable boxes; and under Sections 614(b)(7) and 623(b)(7)(A)(i) cable would be required to carry DTV signals on

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[20/](...continued)
numerous cable program services continue to seek carriage as any new cable channels become available and these services have equal merit with any of the program offerings of the Broadcasters which may lack local content.

the basic tier, rather than rolling out digital cable only to subscribers who choose to add a new digital service tier.[21/]

Also, under the interpretation of various provisions of the statute urged by the Broadcasters, cable would be required to provide every subscriber with an STB - and modify the headend - to permit broadcasters to: (i) control their channel position; (ii) provide their own navigator/program guide, i.e. act as "editor" of the entire cable system; and (iii) switch at will between HDTV/ multiple DTV/ other services (Internet, datacasting) so long as such services are advertiser supported. Yet these broadcast services may compete with cable services counted on in cable business plans to defer some of the cost of cable upgrades for digital TV, Internet and telephony.[22/]

The Supreme Court in the *Turner* cases contemplated cable ready TV sets or use of existing analog converters to continue carriage of existing signal complements. The burden was limited to channel capacity only and involved in the Court's view the addition of very few stations not already carried.[23/] A multi-billion dollar investment by cable in technology required to add

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[21/] NAB, for example, insists, "DTV signals must be available to cable subscribers on a free tier of programming...." NAB at 41. Of course, the basic tier is not required to be offered "free". But it must be the lowest priced tier and available to all subscribers.

[22/] *E.g.*, NAB at 35-42; MSTV at 26-36.

[23/] *Turner II*, 117 S.Ct. 1174, 1198 (1997).

to cable systems new broadcast service offerings was not contemplated in *Turner*.

Beyond these glaring differences, the fundamental precepts of *Turner* would become subject to reconsideration, and analog must carry may be invalidated, in the event the Commission substantially revises the must carry rules as urged by the Broadcasters. To follow the suggestion in the Statement of Jenner & Block ("J&B"),[24/] that a legislative record cannot be revisited and the Commission must follow existing statutes and rules regardless of changed circumstances, in the past has led to reversal of the Commission by the Court of Appeals:

> Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation. We hold that the Commission is statutorily bound to determine whether that linkage now exists.[25/]

The Broadcasters may well find that inviting the Commission to rewrite the must carry rules will reopen for judicial review of

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[24/] NAB, Appendix A, at 12-15. Mischaracterization of a partisan legal argument as a "Statement" is inappropriate.

[25/] *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979)(footnotes omitted). Notably absent from J&B's "Statement" is any citation to any case involving the Commission. J&B appears to rely solely upon two cases involving municipal regulation of sexually oriented businesses. *Id.* at 13.

all aspects of the must carry statute adopted in 1992 under significantly different circumstances.

The new digital must carry demands and the changes in circumstances since 1992 may well mean that the standard of intermediate scrutiny no longer may be applicable and strict scrutiny may now be more appropriate. A majority of the Court did not find anti-competitive behavior on the part of cable as alleged by NAB, but based their decision upon the government's interest in preserving the content of over-the-air programming, leading the four dissenters to conclude, "Under these circumstances, the must-carry provisions should be subject to strict scrutiny, which they surely fail."[26/] The concurring opinion of Justice Breyer was based upon an alleged need to preserve "a rich mix of over-the-air programming" in order to preserve "a multiplicity of information sources."[27/] The four dissenting Justices therefore concluded that a majority of the Court would agree that, "...[W]e [cannot] evaluate whether must-carry is necessary to serve an interest in preserving broadcast stations without examining the value of the stations protected...."

[26/] *Turner II*, 117 S. Ct. 1174, 1208 (1997).

[27/] *Id.* at 1204. Of course, Justice Breyer's vote was the critical fifth vote in upholding the constitutionality of analog must carry.

In that regard, the Dissent noted that a Federal Trade Commission 1991 Study found that "most cable systems voluntarily carried broadcast stations with any reportable ratings in non-cable households....", leading the Dissent to conclude:

> When appellees are pressed to explain the Government's "substantial interest" in preserving noncable viewers' access to "vulnerable" or "marginal" stations with "relatively small" audiences, it becomes evident that the interest has nothing to do with anticompetitive conduct, but has everything to do with content - preserving "quality" local programming that is "responsive" to community needs.[28/]

During the intervening years since 1992, cable operators have become subject to increased competition from DBS and medium powered satellite and private cable as a result of developments in digital technology, demonstrating that such technology is having a pro-competitive market impact, irregardless of any DTV must carry requirement. Digital technology not only is spawning increased competition to cable in the delivery of multi-channel video programming (DBS compression technology, for example, is digital), but, at the risk of stating the obvious, the explosion in Internet usage has proliferated the number of First Amendment voices and drastically reduced the barriers to entry in gaining wide dissemination of any particular point of view.[29/] Under

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[28/] *Turner II*, 117 S.Ct. at 1212.

[29/] The fact that non-cable households may obtain information (continued...)

these circumstances, the public interest in guaranteeing access to cable for marginal broadcasters with no measurable ratings - and possibly no locally oriented programming - should be reconsidered.

Although cable was characterized as engaging in "anti-competitive" conduct by the proponents of must carry and four of the Justices in *Turner II*, cable operators and programmers legitimately regard the Broadcasters' position as anti-competitive today. NAB essentially argues that must carry is necessary to guarantee the success of digital television. NAB asserts that only if broadcasters have "*certainty*" of cable carriage will they "have the incentive to aggressively continue their plans to borrow money, hire consultants, order DTV equipment and push ahead to their DTV future."[30/] Cable program services have had to operate in a world without "certainty" and

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[29/](...continued)
from the Internet undercuts their need to rely upon broadcast media. Increasing use of the Internet recently was described by Steve Case of America Online in the following terms. "***EM:*** *Is AOL a rival to the broadcast networks as the new mass medium?* **Mr. Case:** It's wrong to look at this new medium through the prism of technology or historical separation between industries. The most striking statistic about AOL is not that we have gone from 200,000 members when we went public six years ago to 13 million members today, but that we've gone from customers using us an average three hours a month to an average 25 hours a month. As people use more time on the Internet, they will devote less time to other things like television." *Electronic Media*, Nov. 9, 1998, at 32 ("Still a cyber-pioneer").

[30/] NAB at 12 (emphasis in original).

have had to assume entrepreneurial risk in borrowing money, hiring personnel, ordering equipment, and otherwise attempting to launch their services in a competitive environment for audience share and channel capacity. Similarly, cable operators must compete for subscribers against competitors such as DBS and private cable companies who are not subject to must carry and are free to design their channel line-ups without governmental intervention.

Also anti-competitive is the NAB's strident demand that the government intervene "*as an incentive for consumers to purchase DTV sets.*"[31/] Government intervention in order to induce consumers to purchase DTV sets, as opposed to NTSC sets, or personal computers, washing machines, boats or motorcycles, appears improper and anti-consumer, extending the regulatory regime not only to what cable subscribers should watch, but also to what consumers should buy. The Commission's proper role is to allocate spectrum and adopt regulations to allow private industry to pursue new technologies and services, not to attempt to guarantee their success.[32/]

[31/] NAB at 7 (emphasis in original).

[32/] Broadcasters candidly admit that their original motivation in proposing HDTV was to prevent mobile communication use of vacant broadcast spectrum for as long as possible. "**EM:** *Is it fair to say that this [HDTV] was generated primarily as a way to keep channels?* **Mr. [John] Able:** Yeah, keep channels. At the time, it was definitely political in the sense that we were losing the

(continued...)

Changes in technology over the intervening years also would require reconsideration of the Court's view of the viability of the so-called "A/B" switch as an alternative, and less constitutionally intrusive, remedy.[33/] Therefore, consumers who are interested in receiving broadcast DTV can join to their sets the necessary antenna and decoder inputs and switch seamlessly between those inputs and their cable service.[34/] It is no answer to say that off air reception of DTV is inadequate. The justification for must carry was preservation of free television signals for non-cable subscribers. A non-cable subscriber who cannot receive an off-air DTV signal in a given location gains

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[32/](...continued)
channels to land mobile in the top 10 markets. **EM:** *Is it too much to say it was a scam?* **Mr. Abel:** I don't think it was a scam. There was an FCC proposal to give the channels to land mobile in the top 10 markets." *Electronic Media*, Oct. 26, 1998, at 30 ("Father of digital ponders his baby's future"). In authorizing HDTV, DTV and the dual channel transition scheme, the Commission already has made a public interest judgement - that allegedly more or better television is of greater public benefit than more, better, and lowered priced mobile phone service. Yet many consumers might disagree with the Commission's premise and prefer that the spectrum had been allocated for mobile service, especially as mobile Internet access explodes in popularity.

[33/] Armstrong and Inter Mountain support the comments of several cable commenters who noted that multiple input ports and built in selector switches now are included even in moderately priced NTSC sets. *E.g.*, Time Warner at 6; Discovery at 10 and 25.

[34/] Notably the Broadcasters have not regarded the inconvenience of switching between inputs as a justification to allow DBS to deliver out of market broadcast signals.

nothing by requiring cable to deliver the signal to cable subscribers.

Since 1992 the number of so-called "truly independent" stations has declined, new broadcast networks have used the acquisition of fringe stations, coupled with the must carry law, to gain an advantage over other programmers in launching their program services on cable, and technology has made the "A/B" switch a more common and acceptable alternative to must carry. In any reconsideration of the must carry law by Congress or the Court, the reality of what has occurred since 1992 cannot be ignored and it appears doubtful that even the current analog must carry law now would be approved under an intermediate scrutiny test. Certainly the broad expansion sought by the Broadcasters is without question unconstitutional.

III. The Must Carry Statute Does Not Support Dual Must Carry.

Broadcasters assert that imposition of a dual digital must carry requirement during the transition period from analog to digital television ("the transition period") will speed the completion of the transition by encouraging consumers to buy new digital television receivers:

> **The key to success for a transition** of such enormity and breadth (225 million TV sets, 100 million TV households and 1600 TV stations), and

> certainly its length, **is consumers buying DTV sets quickly and in large numbers.**[35/]

But digital must carry would have exactly the opposite effect - the market for digital television receivers would be shrunken drastically, economies of scale would take far longer to develop, digital receivers would remain a luxury item, and broadcasters indefinitely would retain two television channels.

A clear reading of the must carry statute, if applied to digital channels during the transition period, would require cable operators to supply every subscriber with a set top box ("STB" or "cable box") capable of down converting DTV for reception on every existing NTSC receiver connected to cable.[36/] The FCC's goal of a timely transition to digital would be impeded, not expedited as the market for DTV receivers would be depressed and economies of scale would be delayed. And despite the fact that every cable subscriber would be provided with a free down converter for every NTSC television receiver, broadcasters would still be able to escape returning one of their

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[35/] NAB at ii.

[36/] 47 U.S.C. §534(b)(6) and (7), 543(b)(7)(i). Why would cable subscribers buy digital television receivers if they receive DTV down converters from their cable company under government imposed regulations?

two channels in any market where cable has less than 85% penetration.[37/]

The cost to cable operators of providing every subscriber with a DTV down converter for every NTSC receiver would be enormous (NCTA estimates $50 to 90 billion) and the burden would be placed upon the subscribers least able to afford it, i.e., basic cable subscribers, as discussed further in the constitutional section of this Reply.[38/] What is significant here is that the terms of the must carry statute are incompatible with the goal of speeding the transition to digital.

A. Section 614(a) and (h)(1)(A) Does Not Authorize Dual Must Carry.

The Broadcasters argue that Section 614(a) and (h)(1)(A) require dual carriage of both analog and digital signals of every commercial TV station and the Commission basically has no discretion in this rulemaking, in fact, Paxson argues the

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[37/] 47 U.S.C. §309(j)(14)(B)(iii). Although the statute includes "a cable system or other MVPD", satellite MVPD's and other MVPD's not subject to must carry would not likely qualify as they would not be "carrying one of the digital television programming channels of each of the television stations broadcasting such a channel in such market." Thus, broadcasters would escape returning their second channel wherever franchised cable has less than 85% penetration, knowing full well that franchised cable is subject to increased competition that may lower penetration rates.

[38/] Armstrong alone estimates its converter cost at about $80 million.

Commission cannot even conduct this rulemaking.[39] These assertions are at odds with the plain and unambiguous language of the statute.

Section 614(a) requires carriage of "the signals of local commercial television stations."[40] Although the term "signals" is used in the plural, this is not dispositive because the term "stations" also is used in the plural. In order to determine whether Congress intended for cable systems to carry multiple signals from a single station, Section 614(a) must be read together with the definition of a station.

Section 614(h)(1)(A) defines "a local commercial television station" for purposes of Section 614 as "any full power . . . station . . . licensed and operating on **a** channel **regularly assigned** to its community by the Commission . . . ."[41] Note two things. First, the statute refers to "**a**" channel - not dual or multiple channels. Second, the statute refers to a channel "**regularly assigned.**" The assignment of two channels to each station is not "regular," on the contrary, it is a temporary, transitional assignment only.[42]

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[39] *E.g.*, NAB at 3-6; Paxson Comments (hereafter "Paxson") at 12.

[40] 47 U.S.C. §534(a).

[41] 47 U.S.C. §534(h)(1)(A)(emphasis added).

[42] Armstrong and Inter Mountain need not belabor the point that the assignment of two channels to each television station is an (continued...)

Thus, the words of the must carry statute, read without need for any special administrative expertise, by their plain, simple and unambiguous meaning, only permit the Commission to require carriage of "a", i.e. one, channel of each station, and only a channel "regularly assigned" - not a dual channel specially assigned during a limited transition period. Not until the Broadcasters have turned in one of their two transition channels will the remaining DTV channel be their "regularly assigned" channel entitled to must carry status under Section 614(a) and (h)(1)(A).

B. Dual Must Carry Is Inconsistent With Virtually Every Provision Of The Must Carry Statute.

Dual must carry of analog and digital signals during the transition period before consumers have replaced their NTSC receivers with new digital receivers would be inconsistent with the provisions of the must carry statute. It would impose an immense financial burden compared to cable's market place plan to roll-out digital STB's only to those who subscribe to a new digital service tier.[43/]

[42/](...continued)
extraordinary, unprecedented circumstance in the history of this Commission - and not a regular channel assignment by any stretch of the imagination. The Broadcasters attempted reading of this provision ignores not only its plain meaning, but the entire record of this Commission's activities since 1934.

[43/]Section 614(b)(7) requires that must carry signals be provided to "every subscriber" and be viewable on "all television
(continued...)

It would severely disrupt cable channel line-ups, if applied according to its plain meaning.[44/]

Broadcasters want to rewrite the primary signal rule to require carriage of the entire digital bit stream - except pay services.[45/] Broadcasters want headends and cable boxes to include complex navigation software to:

- Use cable channel numbers that may not in fact correspond to over the air numbers;
- Pass through broadcaster generated program guides; and
- Allow broadcasters to switch at will between HDTV and multiplexed DTV signals.[46/]

This wish list has nothing to do with "preserv[ing]...free, local television". It has everything to do with giving new programming

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[43/](...continued)
receivers." 47 U.S.C. §534(b)(7). This would require cable to provide a down converter to every subscriber for every television set, and to put DTV signals on the basic tier, rather than cable's plan for a digital tier roll-out, with the cost imposed upon basic cable subscribers, rather than digital tier "early adapters".

[44/] Section 614(b)(6) requires "each channel" carried under the must carry rule to be carried "on the cable system channel number on which the local commercial television station is broadcast over the air . . . ." 47 U.S.C. §534(b)(6). Broadcasters apparently want to rewrite this and require carriage of digital channels at the same position as the existing analog channel, i.e., Ch. 4 for analog, and 4.1, 4.2, 4.3 etc. for digital. ALTS at 73-75; MSTV at 32-35. No statutory basis exists for such channel shifting or linking, as the statute refers only to "the cable system channel number" that corresponds to the station's over the air channel number. Note that it refers to the "number" not "numbers".

[45/] Section 614(b)(3)(A) only requires cable to carry a broadcaster's "primary video" signal. 47 U.S.C. §534(b)(3)(A).

[46/] *E.g.*, ALTS at 73; MSTV at 32-37.

and new program guides to be created by the Broadcasters a competitive advantage vis-a-vis cable programmers and cable program guide creators - at the same time that Broadcasters also will be launching subscription services that they presumably would link to and promote on their "free" channels - and with no assurance that any of these new services will be "local" in nature.[47/]

By asking the Commission to rewrite must carry in a manner favorable to them, broadcasters admit that dual carriage of analog and digital signals is inconsistent with the existing rules.[48/] The only statutory basis for making revisions to the must carry rules is Section 614(b)(4), the "Signal Quality"

[47/] NAB at i. The request for carriage of broadcasters' "program guides" is inconsistent with the statute. The statute requires carriage only of "program-related material" and specifically allows cable operators to exclude "other material...or other nonprogram related material (including teletext and other subscription and advertiser-supported information services)." 47 U.S.C. §534(b)(3). "Program-related material" means material related to the specific television program with which material is broadcast; it does not mean a general program guide covering other programs or signals of the broadcaster, and certainly not a guide covering channels of other parties.

[48/] While Broadcasters ask the Commission liberally to rewrite several provisions of the statute, they urge a narrow reading of the non-duplication provision, 47 U.S.C. §534(b)(5), arguing it applies only to two different stations, not to duplicative signals of the same station. Paxson at 29-30. But the policy behind non-duplication clearly is implicated where the transition scheme is premised upon increasing, and eventually 100% simulcasting. Multi-casting of other non-simulcast services is not an answer as it contradicts the statutory limitation of cable's obligation to carry only the "primary video". 47 U.S.C. §534(b)(3).

provision that authorizes the Commission to commence a proceeding to revise the must carry rules as necessary to ensure cable carriage of signals, "which have been changed" to conform to the new DTV standards.[49/] The attempt to rely upon this narrow provision to rewrite the must carry rules to create dual digital and analog carriage rights is unsustainable, as the plain meaning of the statute allows all of its provisions to be reconciled with Option 7, namely, that digital must carry will apply only when broadcasters have returned their analog channels.

A Plain Reading of the Statute as a Whole - After the transition period is over, broadcasters signals will "have been changed" consistent with Section 614(b)(4)(B). Cable hopefully will be able to make DTV channels available to all of their subscribers and to all of their subscribers' television receivers and will be able to carry the signals on the basic tier because consumers will have transitioned to digital. The digital channel will be the primary video signal of the broadcaster and the channel position issues largely will be self-resolved, as broadcasters will have settled on one channel and returned the other. The statute makes sense when read to apply after the transition is complete, but the Broadcasters attempt prematurely to apply it during the transition period cannot be reconciled with its plain meaning.

[49/] 47 U.S.C. §543(b)(4)(B).

IV. CONCLUSION.

For the reasons stated herein, Armstrong and Inter Mountain believe that Option 7 is the only constitutionally and statutorily permissible option. The Commission simply should allow broadcasters to transfer must carry rights from analog channels to digital channels when they return their analog channels to the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Magdalene Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 22nd day of December 1998, served by hand delivery, a copy of the foregoing "Reply Comments" to:

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